

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION**

LeRoy K. Wheeler,)	
)	
Petitioner,)	ORDER ADOPTING
)	REPORT AND RECOMMENDATION
vs.)	
)	
Colby Braun, Warden, North Dakota)	
State Penitentiary,)	Case No. 1:09-cv-003
)	
Respondents.)	

The Petitioner, LeRoy K. Wheeler, filed a petition under 28 U.S.C. § 2254 for a writ of habeas corpus by a person in state custody on September 8, 2008. See Docket No. 1. On October 10, 2015, Wheeler filed a motion to correct the record under Rule 60(b)(6) of the Federal Rules of Civil Procedure. See Docket No. 49. Wheeler claims he has been denied his right to a meaningful appeal of his underlying conviction in State district court due to alleged alterations to the transcripts of his State court proceedings. See Docket No. 49, p. 1.

Magistrate Judge Charles S. Miller, Jr. reviewed the motion to correct the record and issued a Report and Recommendation on October 19, 2015. See Docket No. 51. Judge Miller recommended Wheeler’s motion be dismissed because Wheeler’s motion is properly construed as a second or successive habeas petition under the Antiterrorism and Effective Death Penalty Act of 1996. Judge Miller recommended the Court dismiss the motion because it lacks jurisdiction to consider a “second or successive” petition in the absence of preauthorization from the Eighth Circuit. See Docket No.51, p. 5. The parties were given fourteen (14) days to file objections to the Report and Recommendation. Wheeler filed an objection on October 28, 2015. See Docket No. 52.

The Court has carefully reviewed the entire record and the relevant law and finds the Report and Recommendation to be persuasive. Accordingly, the Court **ADOPTS** the Report and Recommendation (Docket No. 51) in its entirety, and **ORDERS** the following:

- 1) The Court **DISMISSES** the Plaintiff's Motion to Correct the Record (Docket No. 49).
- 2) The Court certifies that an appeal from the denial of this petition may not be taken in forma pauperis because such a appeal would be frivolous and cannot be taken in good faith.
- 3) The Court finds dismissal of the petition is not debatable, reasonably subject to a different outcome on appeal, or otherwise deserving of further proceedings. Therefore, a certificate of appealability will not be issued by this Court. Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983). If the Petitioner desires further review of his motion he may request issuance of a certificate of appealability by a circuit judge of the Eighth Circuit Court of Appeals.

IT IS SO ORDERED.

Dated this 5th day of November, 2015.

/s/ Daniel L. Hovland
Daniel L. Hovland, District Judge
United States District Court